

APPEAL NO. 040418  
FILED APRIL 7, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 27, 2004. The hearing officer determined that the appellant's (claimant) compensable injury (a thoracic sprain/strain, lumbar sprain/strain and right knee medial collateral ligament sprain) did not extend to and include an injury to the claimant's neck in the form of disc herniations at C4-5 and C5-6, that the claimant did not have disability, and that the respondent (carrier) has not waived the right to contest compensability of the cervical disc herniations at C4-5 and C5-6.

The claimant appealed, contending that the carrier had accepted a compensable neck injury; that there was carrier waiver; and that the carrier should not be allowed to recast the cervical injury, citing Appeals Panel decisions. The claimant also appeals the injury and disability determinations on the merits. The carrier responds, urging affirmance.

DECISION

Reversed and rendered in part, and reversed and remanded in part.

First we note that the hearing officer's Findings of Fact have two No. 8's. We reform the hearing officer's Findings of Fact to renumber the second Finding of Fact No. 8 as No. 8(a).

The claimant, a cabinet maker, sustained a compensable injury on \_\_\_\_\_, when the rear wall of a mobile home fell on her. The claimant claimed injuries to her neck, back, shoulders, and right knee. At the employer's insistence the claimant was seen by Dr. I on \_\_\_\_\_. In a report of that date Dr. I noted that the claimant "scraped her upper back" and found full range of motion of the claimant's neck. The claimant was released to work without restrictions. Dr. I saw the claimant again on August 27, 2002, and noted contusions and strain to the upper back and the medial collateral ligament strain of the right knee. With reference to the neck Dr. I stated that the claimant's "neck moves well, and she denies any trauma at all to her neck" and that the neck has full range of motion. Dr. I released the claimant to return to work at light duty. Dr. I continued to treat the claimant's upper back strain and right knee injury with no further mention of the neck. The carrier, in a certified Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated September 17, 2002, alleging first written notice of the injury on September 13, 2002, accepted liability for injury to the "neck, back, shoulder, & right knee." On November 25, 2002, another doctor certified the claimant at maximum medical improvement on that date with a 0% impairment rating. No mention was made of any cervical complaints at that time. The claimant had continued to work, first at light duty and then at full duty on October 30, 2002, until December 6, 2002, when she was laid off due to a reduction in force. The

claimant applied for and began receiving unemployment benefits until July 21, 2003, when those benefits ran out. The claimant began treating with a chiropractor who first noted neck pain on May 23, 2003. An MRI performed on June 5, 2003, had the impression of the claimed cervical herniations. In a TWCC-21 dated August 15, 2003, filed with the Texas Workers' Compensation Commission (Commission) August 19, 2003, the carrier denied that the injury extended to the cervical spine and accepted the right knee and low back injury.

The claimant's principal contention is that the carrier had "recast the primary claimed injury" as an extent-of-injury issue. The claimant also contends that the carrier received first written notice of the claimant's injury on \_\_\_\_\_, as found in the hearing officer's Finding of Fact No. 8(a) (although the finding does not specify what the injury was), and therefore the carrier had waived the right to contest compensability of the claimed injury. The carrier contends that it did not receive written notice of the claimed neck injury until at least nine months after the compensable injury and treats the claimed neck injury as an extent-of-injury issue, citing Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)).

Section 409.021 as interpreted by the Texas Supreme Court in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), provides that the carrier is to begin the payment of benefits as required by Section 409.021 or notify the Commission and the claimant of its refusal to pay benefits, within seven days after receiving written notice of the injury. Although the date that the carrier received the first written notice is disputed (the carrier contends it was September 13, 2002, while the claimant contends it was \_\_\_\_\_), the hearing officer, in Finding of Fact No. 8(a) found the carrier received the first written notice on \_\_\_\_\_, and that determination is supported by sufficient evidence. In that the carrier's first TWCC-21 dated September 17, 2002, was not filed until September 19, 2002, a date more than seven days after \_\_\_\_\_, the carrier has waived into a neck injury. The carrier did not attempt to limit the claimed neck injury to a strain/sprain in its September 17, 2002, TWCC-21 or elsewhere. Therefore, the carrier has waived the right to contest compensability of the claimed disc herniations at C4-5 and C5-6.

We reverse the hearing officer's determination that the carrier did not waive the right to contest compensability of the claimant's claimed neck injury in the form of disc herniations at C4-5 and C5-6 and render a new decision that the carrier did waive the right to contest compensability of the claimed neck injury in the form of disc herniations at C4-5 and C5-6. Because of our reversal of the hearing officer's determination on this issue we also reverse the hearing officer's determination that the claimant's compensable thoracic sprain/strain, lumbar sprain/strain, and right knee medial collateral ligament sprain of \_\_\_\_\_, does not extend to and include an injury to the claimed cervical herniations at C4-5 and C5-6 and render a new decision that as a matter of law the compensable thoracic sprain/strain, lumbar sprain/strain, and right knee medial collateral ligament sprain injury of a \_\_\_\_\_, does include the claimed disc herniations at C4-5 and C5-6.

Because the hearing officer's determination on disability was premised on the noncompensability of the claimed cervical disc herniations, we remand the case back to the hearing officer regarding disability, if any, based upon the entire injury, which would include the cervical disc herniations.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **FIDELITY & GUARANTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
701 BRAZOS STREET, SUITE 1050  
AUSTIN, TEXAS 78701.**

---

Thomas A. Knapp  
Appeals Judge

CONCUR:

---

Gary L. Kilgore  
Appeals Judge

---

Michael B. McShane  
Appeals Panel  
Manager/Judge